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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re DARRELL HUDSON	F059448
On Habeas Corpus.	**OPINION**

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Michael E. Dellostritto, Judge.

Michael Satris, under appointment by the Court of Appeal, for Appellant.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Jessica N. Blonien, and Krista L. Pollard, Deputy Attorneys General, for Respondent.

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INTRODUCTION

In 1988, petitioner Darrell Hudson was convicted of kidnapping for robbery (Pen. Code[1], § 209, subd. (b)), with an enhancement for personal use of a deadly weapon, a knife (§ 12022, subd. (b)). He was sentenced to life with the possibility of parole plus one year for the personal use enhancement. In 2009, the Board of Parole Hearings (the Board) conducted his most recent parole hearing. The Board denied parole and found he failed to show remorse for the victim of his life crime, and he displayed obvious anger

[1] All further statutory references are to the Penal Code unless otherwise indicated.

when the Board declined to address his insistence that he had served more time than mandated under a base-term calculation known as the "matrix."[2]

In the instant matter, petitioner has filed a petition for writ of habeas corpus with this court, and contends the Board failed to make adequate findings when it denied parole, because it failed to expressly find that he was not suitable for parole and he remained a current threat to public safety. In the alternative, petitioner argues the reasons given by the Board to deny parole are not supported by the requisite standard of " 'some evidence' " that he "remains currently dangerous." (*In re Prather* (2010) 50 Cal.4th 238, 243 (*Prather*); *In re Shaputis* (2008) 44 Cal.4th 1241, 1245 (*Shaputis*); *In re Lawrence* (2008) 44 Cal.4th 1181, 1191 (*Lawrence*)).

This court issued an order to show cause (OSC) and requested briefing from the parties on several issues, including whether the Board made adequate findings when it denied parole and whether there is some evidence to support the denial of parole.

We will review factual and procedural history of this matter, including the facts of the commitment offense, petitioner's testimony at the most recent parole hearing, and the Board's statements when it denied parole at that hearing. We will review the relevant legal standards and deny petitioner's petition for a writ of habeas corpus.

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[2] If the Board finds a prisoner suitable for parole, the Board then "proceeds to select the base term using a *matrix* of factual variables 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public.' [Citation.]" (*In re Bush* (2008) 161 Cal.App.4th 133, 142 (*Bush*), italics added.) As we will explain, petitioner has never been found suitable for parole to trigger the application of the matrix calculation.

FACTUAL AND PROCEDURAL BACKGROUND

A. The commitment offense[3]

On March 1, 1988, Deborah Allen (the victim) went to the California Republic Bank on North Chester Avenue in Bakersfield to deposit a check for her boyfriend. She walked out of the bank and headed for her Chevrolet Silverado truck. When she reached the truck, petitioner approached her and placed a knife in her face. He ordered her to "scoot over," and threatened to stab and kill her if she did not cooperate. Ms. Allen moved to the passenger seat and defendant entered the driver's side of the truck.

Petitioner drove around and repeatedly threatened to kill Ms. Allen if she told anyone what happened. Petitioner asked for money. Ms. Allen turned over her purse and said there wasn't any money in it. Petitioner did not believe her because she had just left the bank. Ms. Allen explained that she only had $4.00, and petitioner took the money from her purse.

Petitioner continued to drive around and parked at a residence. He told Ms. Allen that if she got out of the truck while he was in the house, he would come back and kill her. Petitioner said if she ran, he would chase her down, kill her, and stab her with the knife. Ms. Allen was extremely frightened and remained in the truck. Petitioner walked to the house, knocked on the door, and no one answered. Petitioner returned to the truck and drove to another house. He went inside, talked to someone, and returned to the truck.

As petitioner continued to drive around, he grabbed Ms. Allen, pulled her up close to him, and put the knife in her face. Ms. Allen described the weapon as a pocket knife with a four-inch blade. Petitioner demanded more money from Ms. Allen. She explained that she would receive a welfare check that day. They went to her parents' house to get

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[3] Given defendant's guilty plea to the underlying felony charges, the following factual statement is from the original probation report and the Board's recitation of the facts of the offenses.

the check but the mail had not yet arrived. Petitioner became extremely upset. They left the house and drove to a nearby Beacon service station. Petitioner pointed the knife in Ms. Allen's face and ordered her to go into the store, buy snacks and cigarettes, and fill up the truck with gasoline. Petitioner warned Ms. Allen that " '[i]f you say anything to anyone, I will stab you and kill you right then and there.' " Ms. Allen complied with petitioner's orders and purchased the items. They returned to her parents' house and found the welfare check in the mail. Petitioner drove to a store where Ms. Allen cashed the check for $255.50.

After cashing the check, petitioner drove back to one of the houses they had previously visited. Petitioner met a man at that house, got back into the truck and followed the other man's car to another location. Petitioner got out of the truck and again warned Ms. Allen about what would happen if she tried to run. Ms. Allen waited in the truck while petitioner used approximately $160 of the welfare check money to purchase a white powdery substance.

Petitioner drove Ms. Allen to another location and asked her to join him inside. She refused. Petitioner went through her purse and removed three or four hypodermic needles, which Ms. Allen used because she was a diabetic. He went into the residence for a few minutes. When he returned to the truck, he was acting extremely paranoid and thought he saw shadows around him.

Petitioner drove Ms. Allen to another location. He again pulled the knife and put it in her face. Petitioner said he knew she was a student at Bakersfield Junior College, and he would come back and kill her. Petitioner said he would not warn her, but he would just kill her. Petitioner used a cloth to wipe away all his fingerprints from the driver's area of the truck. He then got out of the truck and walked away.

Ms. Allen immediately reported the incident to the police. Ms. Allen described petitioner as six feet three inches tall, 190 pounds, and wearing a black baseball cap which said " 'good guys wear white hats.' " When Ms. Allen viewed a photographic

lineup which contained petitioner's picture, she began to physically shake and became scared and nervous. She immediately identified petitioner and said she was positive that he was the kidnapper.

Petitioner was arrested and found in possession of the same baseball cap. When advised of the charges, petitioner stated he had no knowledge of a robbery and kidnapping. He was on parole at the time he committed the offenses.

The charges and guilty pleas

In March 1988, petitioner was charged in the Superior Court of Kern County with count I, kidnapping for robbery (§ 209, subd. (b)); count II, robbery (§ 211); count III, grand theft (§ 487, subd. (2)); count IV, dissuading a witness (§ 136.1, subd. (c)(1)); and count V, dissuading a witness with a weapon (§ 136.5); with enhancements as to counts I and II for personal use of a deadly weapon, a knife. It was further alleged that he had one prior serious felony (§ 667, subd. (a)) and served two prior prison terms (§ 667.5, subd. (b)).

In May 1988, petitioner pleaded guilty to all five felony counts and admitted the personal use enhancement; the prior conviction allegations were dismissed. He entered his plea on condition of being sentenced to no more than life in prison with the possibility of parole plus one year.

The probation report

Petitioner was 25 years old when he committed the instant offenses. He had prior convictions for committing a lewd and lascivious act on a minor in 1977 (§ 288, subd. (a)); battery in 1980 (§ 242); possession of narcotics paraphernalia in 1982 (Bus. & Prof. Code, § 25662); burglary (§ 459) and grand theft (§ 487.1) in 1983; and burglary and receiving stolen property (§ 496) in 1985.

Petitioner was interviewed by the probation officer prior to sentencing, and he did not express any remorse about the offenses. Instead, he claimed to have known Ms. Allen for three or four months, and said she willingly spent her welfare check so the two

of them could purchase drugs. Petitioner also claimed that when she went home, her "old man" got mad that she used the welfare check for drugs, and the victim invented the story about the kidnapping and robbery. Petitioner stated he never threatened her. Petitioner told the probation officer that he was drug-free while he was on parole, but he previously admitted he was addicted to heroin.

Ms. Allen told the probation officer that she was terrified during the four-hour ordeal because petitioner consistently held a knife against her and repeatedly threatened her. Ms. Allen reported that petitioner observed her textbooks from Bakersfield College and her son's school jacket. Petitioner threatened to harm her while she was at school and also threatened to harm her son. Ms. Allen reported petitioner was paranoid, shaky, and nervous during the entire ordeal, and he became worse after he obtained the drugs.

As a result of the ordeal, Ms. Allen stopped attending Bakersfield College because of petitioner's threats. Ms. Allen was hospitalized because of a kidney infection, which resulted from her blood/sugar levels changing due to her emotions at the time of the incident.

The probation report stated petitioner's propensity for violence was "great" and the victim was "extremely fortunate as she was not physically harmed," given petitioner's repeated threats to kill her if she tried to escape or reported the offenses. Petitioner's lack of remorse and failure to admit wrongdoing indicated he was "a very dangerous member of society." "In order for society to be protected, [petitioner] should and must be incarcerated for as long as possible."

Sentencing

In June 1988, petitioner was sentenced to life in prison with the possibility of parole for count I, kidnapping for robbery, plus one year for the personal use enhancement. The court imposed upper determinate terms for the remaining counts and stayed those terms pursuant to section 654.

B. The Board's prior hearings

Petitioner's minimum eligible parole date was April 10, 1996. According to petitioner, he has had a total of nine parole hearings, including the most recent hearing in 2009.

At a 2002 hearing, the two-member Board issued a split decision as to whether petitioner was suitable for parole. As a result, the Board calculated a base aggravated term of 13 years under category I-B of the "matrix," and issued a one-year denial of parole.

According to petitioner, he received one-year denials of parole at his 2004 and 2005 hearings, and a two-year denial of parole at the 2007 hearing.

C. The Board's 2009 hearing

On January 13, 2009, the Board conducted the most recent parole hearing for petitioner. The Board issued a three-year denial of parole. In the instant writ petition, petitioner asserts the Board failed to make any findings that he posed a current threat to public safety when it denied parole; and, in the alternative, that the Board's reasons for denying parole are not supported by the requisite standard of "some evidence" that he remained currently dangerous.

We will now review the entirety of petitioner's 2009 parole hearing.

Petitioner's initial statements about the "matrix"

Petitioner was represented by counsel at the hearing. At the beginning of the hearing, petitioner was advised about the hearing process and procedures. Petitioner asked if he could ask questions during the hearing. The Board replied it depended on the type of question, "if there's no benefit behind the questions we may not answer them," and "if you've got a question, we'll try to explain it. If it's something that we can't explain we won't."

The Board asked petitioner's attorney if there were any preliminary objections. The following exchange ensued:

"ATTORNEY SHAPIRO: Yes, [petitioner] has a preliminary objection that he believes the Title 15 Matrix has the maximum of either 17 years or 21 years, depending on the offense, depending on how it were to be interpreted. He feels that should have been enough to already get a parole date and certainly get a parole date now.

"PRESIDING COMMISSIONER PRIZMICH: Okay. *Well the Matrix only comes into play when you get a parole date, that's when we calculate it, but I understand your position*. We're going to move forward with the hearing. Any other objections, sir?

"ATTORNEY SHAPIRO: *Yeah, and I explained to him how the Panel usually interprets that, but he wanted to put that on record*.

"PRESIDING COMMISSIONER PRIZMICH: Okay.

"ATTORNEY SHAPIRO: No, we're ready to proceed.

"[PETITIONER]: Would it make a difference if in 2002 they did set a date and computed my Matrix at 9, 11 and 13?

"PRESIDING COMMISSIONER PRIZMICH: No, it would not. Each hearing is different.

"[PETITIONER]: All right.

"PRESIDING COMMISSIONER PRIZMICH: Each hearing is an independent hearing. If you've got some issues with that, you want to take it to some other court, that's fine. Each hearing is, I mean, I understand what you're trying to get on record. I mean, I have no hard feelings.

"[PETITIONER]: Yeah.

"PRESIDING COMMISSIONER PRIZMICH: But you've got it on the record and we're going to have—each hearing would be different and that's pretty well founded, but if you wish to go somewhere with that, go right ahead.

"[PETITIONER]: All right, thank you.

"PRESIDING COMMISSIONER PRIZMICH: All right. It's on the record."[4] (Italics added.)

After this exchange, petitioner's attorney stated there were no other objections and he was ready to proceed.

Petitioner's criminal, social, and disciplinary history

The Board incorporated by reference, and read into the record, the probation report for the facts surrounding the life crime. The Board also read into the record a portion of the 2003 counselor's report for petitioner's version of events. As stated in the probation report, petitioner originally told authorities that he knew the victim, and they used drugs together that day. In the 2003 counselor's report, however, petitioner admitted he lied about knowing the victim, and reaffirmed his guilt and responsibility for kidnapping her. He denied knowing she was a college student or that he threatened to kill her.

At the hearing, the Board asked petitioner about these statements. Petitioner stated he did not know the victim before he kidnapped her, and he admitted that he previously lied about that fact in the probation report. He was not sure whether he knew she was a student, or whether he even made that statement. The Board asked why his knowledge about her student status was important, since "this woman had the stuff scared out of her," and she thought "something really bad was going to happen." Petitioner conceded that whether the victim was a student was not important, but he was just trying to clarify that point. Petitioner stated he had purchased and injected heroin and cocaine on the day of the offense, and that he was not aware of what was going on. The Board noted that he

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[4] Petitioner's exchange with the Board was based on his interpretation of the statements made by the Board at the 2002 hearing. However, the Board correctly and accurately advised petitioner at the 2009 hearing that the prior matrix calculation did not apply to his current parole hearing. It is "only when the prisoner has been found suitable for parole … that the Board proceeds to select the base term using a matrix of factual variables" as set forth in the California Code of Regulations. (*Bush*, *supra*, 161 Cal.App.4th at p. 142.)

was aware enough to make up a story. Petitioner explained he was arrested three days after the kidnapping and that he was not under the influence when he gave his story.

The Board reviewed defendant's prior criminal history as a juvenile and an adult. As a juvenile, petitioner sounded a false alarm and was reprimanded, committed malicious mischief and was admonished, and stole a bicycle but no action was taken when it was returned. He was also placed on informal probation at the age of 14 for committing lewd and lascivious acts on a child. As an adult, petitioner was convicted of burglary and grand theft for stealing from cotenants in his apartment building and taking money from the washing machine change box. He was also involved in the battery of an inmate at the California Rehabilitation Center (CRC) and found unsuitable for placement. He had a history of being remanded to the California Youth Authority (CYA). In 1983, he was sentenced to three years in prison for burglary and grand theft. Petitioner was on parole when the life crime was committed.

With regard to social history, petitioner (born 1963) completed high school through the 11th grade. He got married, quit school, worked in a fast food restaurant, and then worked at a Honda shop assembling motorcycles. He was divorced three years after his incarceration on the life crime. Petitioner's parents were divorced when he was three years old; he never met his real father. Petitioner's mother was alive but she could not visit him in prison because she has a criminal record. Petitioner's brother had also been incarcerated and died a violent death. His sister was alive and incarcerated. Petitioner had no family visitors while in prison.

Petitioner said he started injecting heroin when he was 19 years old because he grew up in that environment and was exposed to people who also injected. He also used cocaine or crank. Heroin was his drug of choice. Petitioner claimed he never used alcohol or marijuana.

Petitioner attended CRC following his conviction for a previous offense, but he did not complete the program. At that time, he failed to attend Alcoholics Anonymous

(AA) and Narcotics Anonymous (NA) because he was ignorant and his life was out of control. Petitioner explained that he was trying to fit into a crowd of people, and his immediate and extended family had a long history of drug abuse and prison life.

In terms of institutional behavior, petitioner has had a total of ten 115's, but only four 115's while serving his life term.[5] He had had a total of eighteen 128(a)'s.[6] In 1994, petitioner had more than one 115 for possession of tobacco in administrative segregation. Petitioner received his last 115 in 1999 for missing work. In 2007, petitioner's cell was searched and tobacco was found, but his cellmate was written up for the violation, and petitioner was not disciplined. In 1988 and 1998, while serving his current term, petitioner received two 128's for not showing up to work and one for being late to work. As of September 2008, his work history showed satisfactory grades and one period of above average performance.

Petitioner's mental health evaluations

Petitioner's most recent psychological evaluation occurred on January 7, 2009. Petitioner was in group therapy for anger management, stress, and communication. He started attending the group in March 2008, and he was described as a leader and a positive and contributing member of the group, who was calm and used his verbal skills to defuse situations.

The Board reviewed petitioner's participation in group therapy, and asked "what have you gotten out of the group yourself? It seems like you help others." Petitioner said he learned to think before he acted and to take "other people's feelings into consideration,

[5] Misconduct by an inmate that is a violation of law, or is not minor in nature, is reported on a Form 115 rules violation report. (Cal.Code Regs, tit. 15, § 3312.)

[6] Minor misconduct in prison is documented on a Form 128-A, "Custodial Counseling Chrono." (Cal.Code Regs., tit. 15, § 3312.)

not always mine." When asked for an example, petitioner explained that he has learned how to deal with other inmates who are bitter and not to take such encounters personally.

The Board asked petitioner whether group therapy had helped "regarding your life crime?" Petitioner replied that it taught him to be "considerate of other people" and that he could not act "the way I did over 20 years ago, being selfish and inconsiderate."

The Board turned to petitioner's psychiatric evaluation of August 2008, which summarized petitioner's previous evaluations in 1996, 2001, and 2006. The 2008 report stated that petitioner's future dangerousness was "from the low end of extremely low range for future violence to just low range below average compared to other inmates." Based on the Hare Psychotherapy Checklist (HCR-20), petitioner's overall level of risk for future violence was in the moderately low to low range. On the PCL-R (Hare Psychopathy Checklist Revised), petitioner was in the low range for future violence. On Axis I, the doctor listed poly-substance abuse in institutional remission. On Axis II, the doctor listed antisocial personality disorder that was improved. The doctor was of the opinion this diagnosis could remain until petitioner had an opportunity to demonstrate himself in the outside world.

Petitioner had attended AA and NA for 20 years, evaluations praised him for taking leadership positions in the groups, and he was a facilitator for the relapse prevention program. He claimed to have been drug free since February 13, 1990.

The Board asked petitioner what was the most difficult step in the 12-Step Program. Petitioner said they were all difficult, but step one was the most difficult because he had to admit that he was powerless. The Board asked petitioner about step nine, to make amends to those he had harmed. Petitioner said he had written a few letters to some people that he had wronged, and "[s]ome were received with an open heart and some were not." "[A]ll I can do is attempt to make amends, except when to do so, as [step] nine states, if it would harm. And also there are some people that it might be best that I never do attempt, you know. But that's all I can do is make the attempt."

The 2008 psychiatric report stated petitioner had "verbally expressed regret and remorse for his life crime and for his criminal behavior," his insight had increased, he had utilized mental health resources and prison programs to increase self-understanding, and he had "demonstrated continuously improving impulse control." The report further stated:

> "As for the management of future risk domain, [petitioner] will inevitably be exposed to stressors and destabilizers. He is adequately addressing the primary risk factors for recidivism which in this case is substance abuse relapse. His choice of program subsequent to parole is a wise one. He has increased his coping skills and impulse control which should serve him well on parole.… [Petitioner] is clear on the fact that his substance abuse led to his life crime and his previous property related offense. He is determined to remain clean, sober and has taken the appropriate steps to ensure a successful parole. *He expresses remorse and regret for the victim.* He has engaged in the appropriate self help courses and 12 Step Program to raise his chances of success. His parole plan is solid and well thought out.… If paroled, he may continue his self help endeavors with Mankind Program. If he remains incarcerated, deep exploration of the underlying cause of his drug addiction would yield further insight." (Italics added.)

The Board asked petitioner to comment on the psychiatric evaluation. Petitioner said that he had received positive evaluations which assessed his future dangerous "from the low range to extremely low."

The Board noted petitioner had participated in five sessions of a victim awareness program in 2007 and 2008, and asked petitioner about his experiences in those programs. Petitioner replied:

> "My experience there was it brought to light a lot of things that I never took into consideration when committing my property related crimes and then the commitment offense that I'm here now for. I've never took into consideration of what it does to people, my behavior, my addiction, you know, to steal a T.V. or to steal something like that from someone's home that they've worked for. It brought the victim up front and made it on a personal level, letting me realize that regardless of how small I thought the act was, it could have a profound impact on other people."

Petitioner's parole plans

Petitioner stated he had one friend with whom he corresponds, a Mr. Glomb, who occasionally visits him. Petitioner met Mr. Glomb about nine years ago when petitioner attended the "Mankind" self-help group in Folsom Prison. Petitioner explained that "Mankind" was a support group "of men that are [pillars] of their community and they offer help to people such as myself that have gotten off track and want to make wrongs right." Mr. Glomb was a participant in the program and he was not an inmate. Petitioner was still involved in that program.

Petitioner stated he participated in Mankind's four-day intensive program about deep introspection and self-examination. The Board asked petitioner to explain his experiences in that program. Petitioner said inmates are reluctant to "go deep and explore the demons that we live with," and the group provides assistance from "other men that have been there and done that and know what the journey is like."

Petitioner had earned certificates for three vocations: silk screening in 1989, building maintenance in 2000, and mill and cabinet work in 2002. He completed his GED in 1988.

In terms of parole plans, petitioner planned to live with Mr. Glomb and his wife at their Sebastopol residence. There were no children in the house. Petitioner did not know the number of bedrooms at his residence. Mr. Glomb sent a letter of support in September 2008, and offered petitioner a job at his environmental consulting firm, to perform the labor to obtain soil samples. Petitioner planned to join the Mankind group in Sebastopol.

Petitioner presented a May 2008 letter from another participant in the Mankind program who offered petitioner a job in his construction company in the Sebastopol area.

Petitioner had met a Pentecostal minister in prison who baptized him, and they had corresponded for over 20 years. The minister lived in Bakersfield and sent a letter in

November 2008 offering moral support and that he would help petitioner look for a job in the oil fields.

Closing statements

The Board received a letter from the Kern County District Attorney's office, which opposed a grant of parole. The district attorney did not make a personal appearance at the hearing.

Petitioner's counsel argued that petitioner had a very good disciplinary record, his psychiatric reports were very supportive, he had done "tons" of self-help groups, he had three vocations, he had very good employment prospects upon release, and he was at an extremely low risk of future violence.

Petitioner's counsel noted that Kern County had not "bothered to come either to this hearing or prior hearings, has only sent letters. We feel that if they really felt it was a priority to oppose parole, that they would have had someone come to one of his hearings which has not happened."

The Board asked petitioner to make a closing argument as to why he was suitable for parole. Petitioner stated he had been disciplinary-free for 15 years, and his last violation was for missing a day of work. Petitioner stated: "[T]here is nothing there that would indicate that I sit before you today as a threat to public safety." His conduct showed that he had "the ability to follow the rules, to do as I'm supposed to do," he had the coping skills and necessary support, and the psychiatric reports showed he was ready for parole.

Petitioner's final statements about the matrix

After petitioner completed his personal statement, the Board was about to call a recess and take the matter under submission, when petitioner apologized and asked to make an additional statement. The following exchange occurred:

> "[PETITIONER]: …I would like to, just for the record, state on these Matrix. Now—

"PRESIDING COMMISSIONER PRIZMICH: *No, we're not going to talk about that. That has nothing to do with your parole suitability*. That's what you're supposed to speak to. So we are going to recess for deliberations at this point. The time is 11:43. Is there a problem?

"[PETITIONER]: Well, I'm just confused that I'm not given an opportunity to express the Matrix that is set by—

"PRESIDING COMMISSIONER PRIZMICH: This, as I've already explained, this your opportunity to talk about your suitability for parole. That's it.

"[PETITIONER]: And this would be considered—

"PRESIDING COMMISSIONER PRIZMICH: This has nothing to do with suitability.

"[PETITIONER]: -- in determining my suitability.

"PRESIDING COMMISSIONER PRIZMICH: That has to do with calculating when you can get out. That has nothing to do with suitability. What we're talking about is your suitability.

"[PETITIONER]: Okay, I'm totally aware of what we're in here discussing, you know, but I have some confusion in regards to the fact that in 2002 Matrix was set at nine, eleven or thirteen, and they computed my time. Since then, I have remained disciplinary free and continue to improve upon myself and do nothing but positive things. So I don't see how any other alternative but to honor that Matrix. I don't—I'm confused about that. So that's why I'm trying to make sure that this—

"PRESIDING COMMISSIONER PRIZMICH: That's not this portion of the hearing. So we're concluded at this point." (Italics added.)

D. <u>The Board's decision</u>

The Board called a recess at 11:44 a.m. The Board resumed the hearing at 11:52 a.m. and advised petitioner that he would not receive a parole date. The Board stated petitioner did "very well today up until the end."

"PRESIDING COMMISSIONER PRIZMICH: We went over the Matrix and you're [*sic*] fixation on the Matrix at the beginning of the hearing, and to bring it up again at the end of the hearing was not the appropriate time. I tried to explain that to you. *Obviously you were upset*

as a result of me not answering your question, and we're not going to get into a discussion here. You did very well today. *There were two areas that we were concerned about. Your obvious display of anger or upset or whatever at the end of the hearing doesn't serve you well*. Okay?

"[PETITIONER]: Okay.

"PRESIDING COMMISSIONER PRIZMICH: I mean, especially after all the work that you've done on yourself and I have no doubt that you've done that work. This is a very important thing in your life. We understand that, *but you've got to maintain a little bit better than that, okay?*" (Italics added.)

The Board further advised petitioner that he failed to address whether he felt any remorse for what he had done to the victim of his life crime:

"PRESIDING COMMISSIONER PRIZMICH: "[I]t's clear you're making up your own mind what you think we need to hear, and there's nothing wrong with that.… What we're interested in is your connection to that victim. *We heard nothing about the victim and I gave you plenty of opportunity to talk about the victim if you choose to. That's a component that we're—every Panel is interested in, and I didn't hear anything about it.* I didn't hear anything about—that is what you do with your closing statement, not worry about the Matrix, okay? *We want to know that you have deep remorse, we want to know that you have sincere feelings for what you did and that you—believe me, the words don't mean anything. We can see through that.*" (Italics added.)

The Board acknowledged that petitioner had "done a lot a work on yourself and you should be proud of that," but explained that he would not receive a parole date.

"PRESIDING COMMISSIONER PRIZMICH: And it's not that I want to indicate that we're being nit picky with regard to your—what you've done. You've done a life crime. *Every Panel is going to be darn sure before we put our name on a piece of paper—we're not going to do that today. You're not going to get a date today. But we want to be darn sure before you get out. And that means that you've got to maintain your cool, you've got to respond to the questions that are asked, not second guess what we're asking, okay? And you can't get pissed off.*

"[PETITIONER]: I'm sorry that you feel that I got pissed off.

"PRESIDING COMMISSIONER PRIZMICH: Well, you did.

"[PETITIONER]: *I stated I was confused*.

"PRESIDING COMMISSIONER PRIZMICH: *Now, that was a way of covering it up, guy*.

"[PETITIONER]: *Okay, fair enough*. (Italics added.)

The Board returned to petitioner's failure to address the impact of his life crime on the victim.

"PRESIDING COMMISSIONER PRIZMICH: So at any rate, the offense was carried out—it was cruel. I mean, there's no question we want you to talk about that. *We want you to articulate to the Panel that what you put that poor woman through was bad and we really didn't hear a lot of that. You're going to have to incorporate that*. Not every Panel is going to say, and how do you feel about that? Most of the Panel's are going to let you talk about it, if you choose to. If you don't choose to, we have no clue, okay? It's got to be—that's why you're here, you know." (Italics added.)

Petitioner complained that the Board did not want him to second-guess what it wanted to hear, but he was expected to volunteer information about feeling remorse for the victim. Petitioner continued:

"You know, I'm sorry that you feel that the appropriate remorse is not there, although the psych evaluations indicate so, if I was asked direct questions regarding the victim, I answered them to the best of my ability. But all the psych evaluations, all seven, *all seven of them reflect that my remorse is genuine and sincere*. There is no question about that. I'm sorry that you see it otherwise." (Italics added.)

The Board concluded with the following statements:

"PRESIDING COMMISSIONER PRIZMICH: [W]e do find that the previous record, we did take consideration in regarding your past. In terms of your institutional behavior, we did also consider that. And in a separate decision, *the hearing Panel finds that the prisoner has been convicted of kidnap for robbery and it is not reasonable to expect that a grant of parole will be given at a hearing during the next three years*. You're going to get a three year denial, sir. So with that, we want you to remain disciplinary free, we want you to upgrade, if you need vocational upgrades, keep your letters updated for the next hearing. . . .

"DEPUTY COMMISSIONER MCNAIR: Sir, I want you to really think about what the Chair has said to you earlier. As a matter of fact, *I tried to reach that same point with you when I mentioned—asked you about deep introspection and self examination. I was hoping that you would talk about yourself and what you found out about yourself in relationship to the victim*. So keep that in mind for your next hearing." (Italics added.)

The Board advised petitioner that he had "a three year denial" and concluded the hearing.

E. <u>The superior court writ petition</u>

Petitioner filed a petition for writ of habeas corpus with the Superior Court of Kern County, and argued the Board's denial of parole was not supported by "some evidence" that he was a threat to public safety. The court requested respondent, the Attorney General, to file an informal response as to whether the Board's oral findings were sufficient under *Lawrence* and *Shaputis*. Respondent argued the Board denied parole based on specific findings that petitioner failed to show remorse for the victim of his life crime, and that his demeanor was unacceptable at the hearing when the Board declined to address the matrix calculation.

The court denied the petition and found there was some evidence to support the Board's denial of parole, the Board "examined the totality of petitioner's history including pre and post-incarceration factors," petitioner failed to address the impact of the crime on the victim at the hearing, and he failed to refute respondent's assertion that his fixation about the matrix and display of anger at the hearing demonstrated his unsuitability for parole.

F. <u>Petitioner's writ petition filed with this court</u>

On February 9, 2010, petitioner filed a petition for writ of habeas corpus with this court. Petitioner challenged the Board's denial of parole, and argued the Board's decision was not supported by some evidence that he was a current threat of public safety.

Petitioner denied that he became upset during the discussion about the matrix. Petitioner claimed the members of the Board became upset when he asked to discuss the matrix and calculation of a release date, and their refusal to discuss the issue was unreasonable. Petitioner argued that under the matrix calculations, he had served beyond the suggested base term for kidnapping for robbery, of 13, 15, or 17 years.

Petitioner also complained that it was unreasonable for the Board to expect him to discuss his remorse for the victim when it did not ask him that question. Petitioner argued the Board's findings were refuted by his statements in psychological evaluations about his remorse for the victim.

Petitioner requested this court to grant his writ petition and order his immediate release from prison without parole.

This court's order to show cause

This court issued an order to show cause (OSC) returnable before this court, as to why relief in the instant writ petition should not be granted, and appointed counsel for petitioner. This court ordered respondent Attorney General to address several issues in its return, including whether the Board made express findings that petitioner was unsuitable for parole or represented a current danger or threat if released; whether the Board was required to make express findings or whether this court may deem such findings implied since the Board did not set a parole date; and whether the Board addressed the nexus between petitioner's life crime and his institutional behavior and current dangerousness.

DISCUSSION

I. The Board's discretion to determine a prisoner's suitability for parole

Petitioner has filed a petition for a writ of habeas corpus for this court to review the Board's denial of parole at his 2009 hearing. We will begin by reviewing the applicable statutory and regulatory standards for the Board to determine whether a prisoner is suitable for parole.

A prisoner who was sentenced to an indeterminate life sentence with the possibility of parole may become eligible for parole after serving a minimum term of confinement. (*Bush, supra*, 161 Cal.App.4th at p. 141.) The Board sets the prisoner's release date at a hearing where the Board meets with the prisoner and evaluates his suitability for parole. (*Ibid*.)

"Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel *the prisoner will pose an unreasonable risk of danger to society if released from prison*." (Cal. Code Regs., tit. 15, § 2402, subd. (a), italics added.) In making this decision, the Board is directed to consider "[a]ll relevant, reliable information" available to it, including "the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; ... and any other information which bears on the prisoner's suitability for release." (Cal. Code Reg., tit. 15, § 2402, subd. (b); *In re Gaul* (2009) 170 Cal.App.4th 20, 31 (*Gaul*), disapproved on other grounds in *Prather, supra*, 50 Cal.4th 238.) "Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability.…" (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

The parole regulations list numerous circumstances "tending to show" whether an inmate is suitable or unsuitable for parole. (Cal.Code Regs., tit. 15, § 2402, subds. (c), (d).) The circumstances tending to show unsuitability include the prisoner's commission of the commitment offense in "an especially heinous, atrocious or cruel manner," considering, among other factors, whether the crime was "carried out in a manner which demonstrates an exceptionally callous disregard for human suffering" or the motive was "inexplicable or very trivial in relation to the offense"; the prisoner's previous record of violence; the prisoner's unstable social history; whether the prisoner committed sadistic

sexual offenses; psychological factors, whether the prisoner "has a lengthy history of severe mental problems related to the offense"; and the prisoner's institutional behavior, whether he has "engaged in serious misconduct in prison …." (Cal.Code Regs., tit. 15, § 2402, subd. (c); *Gaul*, *supra*, 170 Cal.App.4th at p. 32, fn. 3.)

The circumstances tending to show suitability include the absence of a juvenile record; a stable social history; signs of remorse, whether the prisoner "performed acts which tend to indicate *the presence of remorse*, such as attempting to repair the damage, *seeking help for or relieving suffering of the victim*, or indicating that he understands the nature and magnitude of the offense;" the motivation for the crime was the result of significant stress in his life; the prisoner suffered from battered woman syndrome at the time the offense was committed; the prisoner lacked any significant history of violent crime; the prisoner's present age reduces the probability of recidivism; the prisoner has made "realistic plans for release or has developed marketable skills that can be put to use upon release;" and the prisoner's institutional activities "indicate an enhanced ability *to function within the law* upon release." (Cal.Code Regs., tit. 15, § 2402, subd. (d), italics added; *Gaul*, *supra*, 170 Cal.App.4th at p. 32, fn. 3.)

These suitability circumstances are only intended to provide "general guidelines ... [and] the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel." (Cal.Code Regs., tit. 15, § 2402, subds. (c), (d).) "[T]he fundamental consideration in parole decisions is public safety," and "the core determination of 'public safety' under the statute and corresponding regulations involves an assessment of an inmate's *current* dangerousness." (*Lawrence*, *supra*, 44 Cal.4th at p. 1205, italics in original.) The Board is authorized "to identify and weigh only the factors relevant to predicting 'whether the inmate will be able to live in society without committing additional antisocial acts.' [Citation.]" (*Id*. at pp. 1205-1206.)

> "[T]he purpose of the parole statutes is to guarantee that the decision makers fully have addressed the public safety implications of releasing on parole any inmate serving a maximum term of life imprisonment. The relevant determination for the Board … is, and always has been, an individualized assessment of the continuing danger and risk to public safety posed by the inmate. *If the Board determines, based upon an evaluation of each of the statutory factors as required by statute, that an inmate remains a danger, it can, and must, decline to set a parole date.…*" (*Lawrence, supra*, 44 Cal.4th at p. 1227, italics added.)

"Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the [Board].... [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the [Board], but the decision must reflect an individualized consideration of the specific criteria and cannot be arbitrary or capricious." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677 (*Rosenkrantz*).)

II. <u>This court's review of the Board's decision</u>

We next turn to the applicable standard for this court to review the Board's determination that a prisoner is not suitable for parole. "[T]he judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law, … " (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 658.) Every inmate "is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate's due process right 'cannot exist in any practical sense without a remedy against its abrogation.' [Citation.]" (*Lawrence*, *supra*, 44 Cal.4th at p. 1205.)

This court's review of the Board's decision is deferential, and only limited grounds exist to overturn a Board's decision regarding a particular inmate's suitability for parole. (*Lawrence*, *supra*, 44 Cal.4th at p. 1210; *Rosenkrantz*, *supra*, 29 Cal.4th at p. 677; *In re Shippman* (2010) 185 Cal.App.4th 446, 455 (*Shippman*).) This court will not disturb the Board's decision if it is supported by " 'some evidence'… that a prisoner

remains currently dangerous." (*Prather, supra,* 50 Cal.4th at p. 243; *Lawrence, supra*, 44 Cal.4th at p. 1212; *Shaputis, supra,* 44 Cal.4th at p. 1254.)

> "[B]ecause the paramount consideration for … the Board … under the governing statutes is whether the inmate currently poses a threat to public safety, and because the inmate's due process interest in parole mandates a meaningful review of a denial-of-parole decision, the proper articulation of the standard of review is *whether there exists 'some evidence' that an inmate poses a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor*. [Citation.]" (*Shaputis, supra*, 44 Cal.4th at p. 1254, italics added.)

"It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Lawrence, supra,* 44 Cal.4th at p. 1212.)

"[T]he Board … may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board.…" (*Lawrence, supra,* 44 Cal.4th at p. 1221, italics in original.)

"[T]he 'some evidence' standard … reasonably cannot be compared to the standard of review involved in undertaking an independent assessment of the merits or in considering whether substantial evidence supports the findings.…" (*Rosenkrantz, supra,* 29 Cal.4th at p. 665.) "Only a modicum of evidence is required." (*Id*. at p. 677.)

"This standard is unquestionably deferential, but certainly is not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the

relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1210.) While the Board has broad discretion, the decision must reflect an individualized consideration of the criteria specified in the regulations and cannot be arbitrary or capricious. (*Rosenkrantz, supra,* 29 Cal.4th at p. 677; *Lawrence*, *supra*, 44 Cal.4th at p. 1205.)

III. The adequacy of the Board's findings as to the denial of petitioner's parole

We now turn to the contested issues in this case. As set forth above, the Board issued a three-year denial of parole at the conclusion of petitioner's 2009 hearing. In doing so, however, the Board did not expressly state that it found petitioner was unsuitable for parole, or that it found petitioner remained a current threat to public safety. However, the Board specifically advised petitioner that it was denying parole because he failed to show remorse for the victim, and because it was concerned about his display of anger when the Board rejected his arguments about the "matrix" calculation of his purported base term. We will now address whether the Board's oral findings were adequate and afforded him with due process.

A. The Board's findings

Petitioner argues the Board was required to make express findings that he was unsuitable for parole and that he posed a current threat to public safety, and the Board's failure to make these findings requires remand for a new parole suitability hearing.

Respondent concedes the Board failed to make express findings of unsuitability and current dangerousness. Respondent further concedes the Board was required to provide a written statement with the reasons for refusal to set a parole date and failed to do so. However, respondent argues the Board's oral decision complied with due process because the Board expressly advised petitioner that he would not receive a parole date, and that he was being denied parole because he failed to show remorse for the victim and it was concerned about his demeanor and conduct at the hearing.

We find the Board's findings in this case comported with due process. As we have explained *ante*, "current dangerousness is the fundamental and overriding question for the Board.…" (*Lawrence*, *supra*, 44 Cal.4th at p. 1213.) The Board has the discretion to determine "the precise manner in which the specified factors relevant to parole suitability are considered and balanced." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 677; *Shaputis*, *supra*, 44 Cal.4th at pp. 1260-1261.)

The Board's decision must reflect "due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards," and the decision cannot be arbitrary or capricious. (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.) " '[D]ue consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Lawrence*, *supra*, 44 Cal.4th at p. 1210.)

The Board must thus consider all relevant factors when evaluating an inmate's suitability for parole. (*Lawrence*, *supra*, 44 Cal.4th at p. 1191; *In re Lazor* (2009) 172 Cal.App.4th 1185, 1201 (*Lazor*).) Those factors involve consideration "of the inmate's postconviction conduct and mental state as it relates to his or her *current* ability to function within the law if released from prison." (*Lawrence*, *supra*, 44 Cal.4th at p. 1220, fn. 19, italics in original.) The prisoner's current demeanor and mental state are probative of a prisoner's current dangerousness, and of the statutory determination of whether he poses a continuing threat to public safety. (*Lawrence*, *supra*, 44 Cal.4th at p. 1214.) The Board must also consider the petitioner's "signs of remorse" and indications the inmate "understands the nature and magnitude of the offense." (Cal. Code Regs., tit. 15, § 2402, subd. (d)(3); *Lazor*, *supra*, 172 Cal.App.4th at p. 1201.) In addition, the Board may consider the prisoner's conduct at the parole hearing as indicative of how he would behave if free in the community. (See, e.g., *In re Bettencourt* (2007) 156 Cal.App.4th 780, 806 (*Bettencourt*).)

As applied to the instant case, respondent correctly concedes that the Board failed to expressly find that petitioner posed a current danger to public safety if he was released on parole. The Board's failure to use that specific phrase is not dispositive, however, because the Board advised petitioner, in clear and unmistakable terms, why it was denying parole. The Board's decision "to defer annual parole consideration hearings is guided by the same criteria used to determine parole suitability. [Citations.] The reasons for postponing the next scheduled parole hearing need not be completely different from the reasons for denying parole suitability. [Citation.] Rather, the only requirement is an identification of the reasons that justify postponement. [Citations.]" (*In re Lugo* (2008) 164 Cal.App.4th 1522, 1537.)

The Board denied parole and specifically advised petitioner of the reasons it was denying parole. As explained forth *ante*, petitioner became upset at the conclusion of the hearing when the Board declined to address his renewed complaint that he should be released under the "matrix" calculations. However, the Board did not summarily deny parole and adjourn the hearing. Instead, it called a recess, conferred, and then resumed the proceedings. The Board gave petitioner specific reasons why he was not going to receive a parole date—he failed to express remorse for the victim of the commitment offense, and it was concerned about his demeanor and obvious anger about the matrix issue—and extensively explained why it was relying on those factors to deny parole.

While the Board did not use the specific phrase that petitioner was unsuitable for parole or remained a current threat to public safety, the Board's explanations reflected its obvious concerns about his current dangerousness, particularly because of his demeanor when it declined to agree with his arguments about the matrix. The Board explained:

> "And it's not that I want to indicate that we're being nit picky with regard to your—what you've done. You've done a life crime. *Every Panel is going to be darn sure before we put our name on a piece of paper—we're not going to do that today. You're not going to get a date today. But we want to be darn sure before you get out. And that means that you've got to*

maintain your cool, you've got to respond to the questions that are asked, not second guess what we're asking, okay? And you can't get pissed off." (Italics added.)

While the Board could have used language that was more artful or precise, the unmistakable conclusion from these findings is that the Board wanted to be "darn sure" that petitioner did not remain a current threat to public safety if released. The Board was particularly concerned because of his failure to express remorse for the victim, and his behavior at the hearing—both of which are valid factors—and the Board related those factors to circumstances that were probative of petitioner's current dangerousness. (Cf. *Shaputis*, *supra*, 44 Cal.4th at pp. 1260-1261; *Lazor*, *supra*, 172 Cal.App.4th at p. 1203.)

When the Board denied parole, it did not simply read a rote recitation of the regulatory factors as to petitioner's unsuitability. Instead, the Board's decision reflected an individualized consideration of specified criteria based on petitioner's specific conduct and behavior at the hearing, and its determination as to the credibility of his prior statements of remorse in the psychological reports. We must still determine whether some evidence supports those findings.

B. *Prather* and *Sturm*

Petitioner argues that the Board is required to make express findings as to his suitability and current dangerousness, and this court cannot imply such findings from the Board's denial of parole. Petitioner's arguments on these points are based on the concurring opinion in the California Supreme Court's recent decision in *Prather*. As we will explain, petitioner's reliance on the concurring opinion does not support his assertion that the Board must make an express finding that the prisoner is unsuitable and poses a current threat to public safety.

In *Prather*, the California Supreme Court addressed a series of cases where reviewing courts granted prisoners writ relief and held the Boards' decision to deny parole was not supported by some evidence that the prisoners remained current threats to public safety. The reviewing courts remanded the matters to the Boards in the respective

cases, but restricted the Board's exercise of discretion in one case by directing that only certain evidence could be considered, and ordering the immediate release of the prisoner in the second case. (*Prather*, *supra*, 50 Cal.4th at pp. 243, 244.)

The majority opinion in *Prather* held that when a reviewing court grants habeas relief to a prisoner, the court "generally should direct the Board to conduct a new parole-suitability hearing in accordance with due process of law and consistent with the decision of the court, and should not place improper limitations on the type of evidence the Board is statutorily obligated to consider." (*Prather*, *supra*, 50 Cal.4th at p. 244.) *Prather* further held that the prior appellate decisions "erroneously failed to recognize the Board's statutory obligation to consider the full record in making a parole-suitability determination" on remand. (*Ibid*.)

As to the specific cases addressed in *Prather*, the court held that the decision in the first case—which limited the Board's consideration of evidence and ordered the Board to find the prisoner suitable in the absence of new evidence—"impermissibly impairs the Board's exercise of its inherent discretion to decide parole matters." (*Prather*, *supra*, 50 Cal.4th at pp. 255-256.) The reviewing court's limiting order prevented the Board from considering new evidence in light of preexisting evidence in the record, which together might be probative of the prisoner's parole suitability. (*Id*. at p. 256.) *Prather* held the more restrictive order in the second case, which barred any further review by the Board, was likewise inappropriate and violated the separation of powers doctrine because it improperly intruded on the Governor's independent constitutional authority to review the Board's parole decisions. (*Id*. at p. 257.)

The concurring opinion in *Prather* addressed a specific point: once a reviewing court reverses a Board's denial of parole because of the absence of some evidence of current dangerousness, the Board may not deny parole at the subsequent hearing on remand "based solely on arguments and evidence that have been presented, *or reasonably could have been presented*, at the prior parole hearing." (*Prather*, *supra*, 50 Cal.4th at p.

259 (conc. opn. of Moreno, J.), italics added.) The concurring opinion stated that based on basic principles of res judicata, a reviewing court's finding that the Board's denial of parole was not supported by some evidence "may not be relitigated." (*Id.* at p. 260.) "[G]iven a final judicial determination" that there was no evidence the prisoner posed a current threat to public safety, "the Board on remand cannot base a finding of parole unsuitability *only* on evidence that was or could have been presented at the [prior] hearing, in effect relitigating that hearing." (*Ibid.* Italics in original.)

In making this point, the concurring opinion stressed the importance for the Board to address all pertinent issues when it considers a prisoner's suitability for parole:

> "[T]he present cases must be considered in light of the injunction in *In re Sturm* (1974) 11 Cal.3d 258, 272 … (*Sturm*), that due process requires the Board to provide a 'definitive written statement of its reasons for denying parole.' This requirement followed from the principle that a prisoner has the right to be ' "duly considered" ' for parole and not to be denied parole arbitrarily, and that such rights 'cannot exist in any practical sense unless there also exists a remedy against their abrogation.' (*Id.* at p. 268.) A definitive written statement of reasons was necessary to guarantee that such an effective remedy exists, because, inter alia, it will help to ensure 'an adequate basis for judicial review.' (*Id.* at p. 272.) It is important that *Sturm* be taken at its words, and that the Board be required to issue a *definitive* written statement of reasons. The Board cannot, after having its parole denial decision reversed, continue to deny parole based on matters that could have been but were not raised in the original hearing. Such piecemeal litigation would undermine the prisoner's right to a fair hearing and the ability of courts to judicially review and grant effective remedies for the wrongful denial of parole.
>
> "In short, the Board, like other litigants and other administrative agencies, is not entitled to the proverbial second bite at the apple. At the parole hearing it must state definitely its reasons for denying parole, i.e., all the arguments and evidence why the prisoner is currently dangerous. If the denial is challenged, the Board must defend its action based on those reasons. If the challenge is upheld, it may not again deny parole based on the same reasons, or based on arguments and evidence that reasonably could have been, but were not, raised at these prior proceedings." (*Prather, supra,* 50 Cal.4th at pp. 260-261, (conc. opn. of Moreno, J.), italics in original.)

Petitioner relies on the concurring opinion in *Prather*, and his discussion of *Sturm* as set forth *ante*, and argues the Board must give a definitive statement of reasons when it finds a prisoner is not suitable for parole, and this court cannot review the record to imply the Board's findings that petitioner remained a current threat to public safety.

Petitioner's arguments on this point are not persuasive. First, his arguments are based on the concurring opinion in *Prather*. However, "a principle stated in a California Supreme Court opinion is not the opinion of the court unless it is agreed to by at least four of the justices," and a concurring opinion is not controlling. (*In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 795, disapproved on other grounds in *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1099-1100.)

Second, as noted in *Prather*, the Board is required to send a prisoner, within 20 days of the denial of parole, "a written statement setting forth the reason or reasons for refusal to set a parole date, and suggest activities in which he or she might participate that will benefit him or her while he or she is incarcerated." (§ 3041.5, subd. (b)(2).) Respondent concedes there is no evidence before this court that the Board sent a written statement to petitioner. However, petitioner has not shown how he has been prejudiced by that failure. Petitioner received a copy of the hearing transcript, and we have found the Board's oral statements at the hearing extensively explained the reasons it denied parole, and demonstrated its obvious concern about petitioner's current dangerousness. The transcript satisfies the purpose of the written statement and clearly suffices to give petitioner the notice contemplated by the statute.

Finally, we acknowledge that "[g]iven the extraordinarily deferential standard of review we already apply to the Board's decisions, it would be inappropriate for courts to salvage the Board's inadequate findings by inferring factors that *might have been* relied upon. *At minimum*, the Board is responsible for articulating the grounds for its findings and for citing to evidence supporting those grounds." (*In re Roderick* (2007) 154

Cal.App.4th 242, 265, first italics added, second italics in original; see also *In re Moses* (2010) 182 Cal.App.4th 1279, 1310-1311, fn. 13.)

Such a situation clearly did not exist in this case. As we have explained, the Board did not become exasperated with petitioner's conduct at the conclusion of the hearing, and simply deny parole without comment. Instead, "the Board did articulate its reasons for denying parole," based on petitioner's failure to express remorse for the victim and his demeanor at the hearing, and "[t]he Board also cited to evidence" in support of these reasons. (*Shippman*, *supra*, 185 Cal.App.4th at p. 463, fn. 3.)

While we must still address whether the Board's findings are supported by some evidence, we conclude the Board made appropriate findings when it denied parole and petitioner's due process rights were not violated.

IV. The Board's decision is supported by some evidence that petitioner posed a current threat to public safety.

We now turn to the question of whether the Board's denial of parole is supported by " 'some evidence' " that petitioner "remains currently dangerous." (*Prather*, *supra*, 50 Cal.4th at p. 243.) We must uphold the Board's decision denying parole if "there exists 'some evidence' that an inmate prisoner poses a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor. [Citation.]" (*Shaputis*, *supra*, 44 Cal.4th at p. 1254.)

We will affirm the Board's interpretation of the evidence only "so long as that interpretation is reasonable and reflects due consideration of all relevant statutory factors. [Citation.]" (*Shaputis*, *supra*, 44 Cal.4th at p. 1258.) The evidence relied on by the Board must have " 'some indicia of reliability' " and " 'some rational basis in fact.' [Citation.]" (*In re Juarez* (2010) 182 Cal.App.4th 1316, 1337 (*Juarez*).)

"Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the [Board]." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.) A finding that a prisoner lacks credibility is relevant to a

determination of the prisoner's current dangerousness, and we defer to the Board's credibility determinations. (*Rosenkrantz, supra*, 29 Cal.4th at p. 665; *Juarez, supra*, 182 Cal.App.4th at p. 1341.)

With these standards in mind, we turn to the factors cited by the Board when it denied parole—that petitioner failed to show remorse for the victim, and because of his conduct and demeanor at the hearing. As we have already explained, these are appropriate factors to find that a prisoner is unsuitable for parole. In reviewing the evidence, however, we must find " 'some evidence' that an inmate poses a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor. [Citation.]" (*Shaputis, supra*, 44 Cal.4th at p. 1254.)

A. <u>Lack of remorse</u>

As we have explained, the Board stated that it denied parole because petitioner failed to express remorse at the hearing for Ms. Allen, the victim of his kidnapping and robbery life crime. Petitioner complains that by relying on his purported failure to express remorse for the victim, the Board played "games of 'Hide the Ball' and "Gotcha'" at the hearing, because it never asked him to address his feelings of remorse for the victim. Petitioner further argues the Board's finding on this point was arbitrary and contrary to all the evidence, because the Board ignored several psychological and psychiatric reports in the record which stated that he had shown genuine remorse for the victim.[7]

[7] Respondent asserts that in addition to his failure to express remorse for the victim, the Board also cited to petitioner's lack of insight when it denied parole. The Board may rely on a prisoner's lack of insight about his past criminal conduct as a factor to find current dangerousness. (*Shaputis, supra*, 44 Cal.4th at pp. 1258-1261 & fn. 20.) In this case, however, the Board only found that petitioner failed to express his remorse for the victim of the commitment offense; it did not make any findings about whether he showed a lack of insight about his past criminal conduct.

As we have explained, a prisoner's current demeanor and mental state are probative of a prisoner's current dangerousness, and of the statutory determination of whether he poses a continuing threat to public safety. (*Lawrence, supra,* 44 Cal.4th at p. 1214.) The Board must also consider the petitioner's "signs of remorse" and indications the inmate "understands the nature and magnitude of the offense." (Cal. Code Regs., tit. 15, § 2402, subd. (d)(3); *Lazor, supra,* 172 Cal.App.4th at p. 1201.)

The Board properly relied upon petitioner's failure to express remorse for the victim at the hearing as a factor showing his lack of suitability for parole. Petitioner complains that the Board abused its discretion when it made this finding, and cites to numerous references in the record where he expressed his remorse for the victim in psychological and psychiatric reports. While a psychological evaluation may contain information that " 'bears on the prisoner's suitability for release,' " such an assessment "does not necessarily dictate the Board's parole decision. It is the Board's job to assess current dangerousness and parole must be denied to a life prisoner 'if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.' [Citation.]" (*Lazor, supra,* 172 Cal.App.4th at p. 1202.)

When the Board denied parole, it informed petitioner that it "heard nothing about the victim" even though it gave petitioner "plenty of opportunity to talk about the victim." Petitioner cited to his statements in the prior reports, but Board explained that it wanted to know whether petitioner had "deep remorse" and "sincere feelings for what you did." The Board further advised petitioner: "[B]elieve me, the words don't mean anything. We can see through that." The Board's findings on this issue strongly imply that it discounted the credibility of his statements in the prior reports based on his failure to address the issue at the hearing. A finding that a prisoner lacks credibility is relevant to a determination of the prisoner's current dangerousness, and we defer to the Board's credibility determinations. (*Rosenkrantz, supra,* 29 Cal.4th at p. 665; *Juarez, supra,* 182 Cal.App.4th at p. 1341.)

As noted by the Board, petitioner failed to address whether he realized "that what [he] put that poor woman through was bad," and it had "no clue" what he felt about the victim because he did not talk about the issue. Respondent correctly notes the Board gave petitioner several opportunities to express empathy for the victim of the kidnapping and robbery. When petitioner tried to explain that he wasn't sure if he knew the victim was a student, the Board replied that his knowledge on that point was not significant because "this woman had the stuff scared out of her," and she thought "something really bad was going to happen." Petitioner conceded the point was not important, but he did not address the Board's point about the impact of his threats on the victim.

When petitioner extensively discussed his participation and leadership in various counseling and therapy programs, the Board asked him about the impact of those programs. Petitioner said he learned to take other people's feelings into consideration. He was asked to give an example, and again failed to address the impact of his actions on the victim. Instead, he talked about learning how to deal with other inmates in prison.

When petitioner discussed his success with the 12-step program, the Board asked about his work to make amends to those he harmed. Petitioner replied that he wrote a few letters to people he had "wronged," but never clarified who he was talking about, and again failed to address the impact of his life crime on the victim.

The Board reviewed petitioner's 2008 psychiatric report, which stated that he expressed remorse and regret for the victim of his life crime, and asked him to comment on the evaluation. Petitioner again failed to address the impact of his life crime on the victim, and instead focused on the report's statement that his future dangerousness had been assessed from the low range to extremely low.

Most importantly, however, the Board asked petitioner about his participation in five sessions of a victim awareness program in 2007 and 2008. Petitioner talked about the impact of his actions on the victims of his "property crimes," such as when he stole a television from someone's home to support his drug addiction. He again failed to address

one of the primary issues at the hearing—the impact of the kidnapping and robbery on the victim.

"We note that expressions of … remorse will vary from prisoner to prisoner and that there is no special formula" for a prisoner to address the issue. (*Shaputis, supra,* 44 Cal.4th at p. 1260, fn. 18.) In this case, however, the Board's reliance on petitioner's failure to express remorse is "amply supported by the record." (*Ibid*.) Petitioner complains that he was advised not to second guess what the Board wanted to hear, and he would have answered any questions about remorse for the victim if he had been asked. However, the Board gave petitioner opportunities to express his remorse for the impact of the commitment offense on the victim, yet he replied with a general discussion about victims in abstract terms, instead of addressing the impact of his criminal conduct on the actual victim of the life crime for which he was seeking parole. The Board had a reasonable basis to discount the credibility of petitioner's statements in the psychological reports in light of his repeated failure at the hearing to discuss the impact of his actions on the victim.

B. <u>The matrix</u>

Petitioner contends the Board violated his due process rights by precluding him from talking about the matrix calculations to set his base term. Petitioner further contends his due process rights were violated when the Board relied on his reaction and obvious "display of displeasure" as another factor to deny parole. Petitioner argues he was entitled to discuss the matrix because the "ultimate purpose" of the hearing was for the Board "to set a parole date." While petitioner concedes the Board's duty to set a parole date "is subordinate to its duty to protect public safety," he argues the Board lacked any statutory authority to prevent him from discussing the matrix at the hearing.

In order to address these arguments, we will briefly review the meaning and applicability of the matrix, and then review petitioner's discussion of this issue at the hearing.

The Board's regulations establish "a matrix of factors for determining the suggested base terms for life prisoners," and "contemplates that even those who committed aggravated murder may be paroled after serving a sufficiently long term if the Board determines that evidence of postconviction rehabilitation indicates they no longer pose a threat to public safety. [Citations.]" (*Lawrence, supra,* 44 Cal.4th at p. 1211.) "When a life prisoner is found suitable for parole, the Board sets a release date by calculating a 'base term' for the offense, adjusted by any credits to which the prisoner is entitled. [Citations.]" (*Bush, supra,* 161 Cal.App.4th at p. 141.)

However, the Board's decision that a prisoner is suitable for release "precedes and is distinct from its choice of a base term fixing an actual release date. [Citations.]" (*Bush, supra,* 161 Cal.App.4th at p. 141.) A prisoner sentenced to an indeterminate life sentence is not entitled to being released on parole, regardless of the amount of time served, unless the prisoner has been found suitable for parole. (*In re Honesto* (2005) 130 Cal.App.4th 81, 92-93 (*Honesto*).) "It is only when the prisoner has been found suitable for parole … that the Board proceeds to select the base term using a matrix of factual variables 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public.' [Citation.]" (*Bush, supra,* 161 Cal.App.4th at p. 142.) "Only after a prisoner is found suitable for parole will the Board consider the appropriate length of the prisoner's term and set a parole date. [Citation.]" (*Honesto, supra,* 130 Cal.App.4th at p. 93.) In addition, the matrices set forth in the regulations " 'are guidelines only,' and the Board may set a term that is shorter or longer than suggested by these guidelines. [Citation.]" (*Ibid.*)

The entirety of the record demonstrates the Board did not improperly refuse to permit petitioner to discuss the matrix. At the beginning of the hearing, petitioner's attorney advised the Board that petitioner had "a preliminary objection" to the proceedings because he believed he had served enough time under the matrix to already get a parole date. The Board correctly advised petitioner and his attorney that the matrix

only applied "when you get a parole date," and asked if there were any further objections. Petitioner's attorney replied that he had already explained that to petitioner. Petitioner interjected and asked if it made any difference if his matrix was computed at the 2002 parole hearing at 9, 11, or 13 years. The Board replied that it did not make any difference because each hearing was separate and independent.

At this point, petitioner had the opportunity to fully and fairly to raise his concerns about whether he was entitled to his immediate release under the matrix. The Board correctly explained that the calculation of the base term under the matrix did not apply until it found he was suitable for parole. Petitioner's attorney said that he had already explained that to petitioner, but petitioner again objected and asked for another explanation. The Board again explained the calculation of the base term at a prior hearing was not binding on the current proceeding. The Board did not prevent petitioner from raising his objections, noted his objections on the record, and continued with the hearing.

Despite being provided with a full and fair opportunity to address this issue, petitioner became upset at the conclusion of the hearing when he again asserted that he was "confused" as to why he was not entitled to an immediate release under the matrix calculations that were performed in 2002. The Board again explained that the hearing was his opportunity to address his suitability for parole, and the matrix calculations had nothing to do with his suitability.

We find the Board provided petitioner with an opportunity to address his concerns about whether he was entitled to release under the matrix. The Board accurately explained that the matrix did not apply until he had been found suitable for parole, and the purpose of the hearing was to determine his suitability and not to consider a prior calculation of his base term under the matrix. Petitioner did not help himself by insisting on his explication of the matrix, and expressing indignation about the Board's refusal to consider the prior Board's findings on that matter. It is the Board's factual assessment of

petitioner and his current dangerousness that is the pivotal question in determining whether he is suitable for parole.

C. Petitioner's demeanor and conduct

As we have explained, the Board relied on petitioner's statements, conduct, and demeanor at the conclusion of the hearing as another reason to deny parole. Petitioner contends the Board improperly relied upon "display of displeasure" to deny parole, because his reaction was the result of the Board's "arbitrary" refusal to hear his arguments about the applicability of the matrix. Petitioner concedes he became "upset" at the conclusion of the hearing, but contends he only displayed "momentary frustration" and "a brief loss of equanimity" because of the Board's improper refusal to discuss the matrix. Petitioner declares his reaction was "altogether understandable," and he was not required to "remain impassive as a Buddha" and "become a punching bag of the Board, devoid of natural human reaction to its abuses, in order to demonstrate his suitability for parole."

As we have explained, a prisoner's current demeanor and mental state are probative of his current dangerousness, and of the statutory determination of whether he poses a continuing threat to public safety. (*Lawrence*, *supra*, 44 Cal.4th at p. 1214.) The Board has the authority to identify and weigh the factors relevant "to predicting 'whether the inmate will be able to live in society without committing additional antisocial acts.' [Citation.]" (*Lawrence*, *supra*, 44 Cal.4th at pp. 1205-1206.)

Of course, the Board may consider the prisoner's conduct at the parole hearing as indicative of how he would behave if free in the community. For example, in *Bettencourt*, *supra*, 156 Cal.App.4th 780, the court held the Board properly considered the prisoner's angry outbursts at the parole hearing in support of its concern as to how he "would behave if free in the community." (*Id.* at p. 806.) *Bettencourt* rejected the prisoner's arguments that his " 'brief interjections' " did not demonstrate an unreasonable risk of current dangerousness because he did use any vulgarity or threats, and did not

harangue anyone. *Bettencourt* rejected the prisoner's characterization of his behavior and deferred to the Board's findings as to his conduct, which supported prior psychological evaluations about his tendency for violent outbursts. (*Ibid*.)

The Board properly relied on petitioner's conduct and demeanor when it denied parole. The Board advised petitioner that he was obviously upset when it declined to answer his additional questions about the sentencing matrix: "Your display of anger or upset or whatever at the end of the hearing doesn't serve you well," and "you've got to maintain a little bit better than that." The Board advised petitioner that it had to be "darn sure" before it granted parole and "we're not going to do that today" because he failed to maintain his "cool" and got "pissed off."

Petitioner admits he displayed "visible frustration" at the conclusion of the hearing but asserts he was just making an "earnest" attempt to discuss the applicable base term, and he merely showed "his reaction of displeasure at being denied his right to address the Board." Petitioner's arguments represent an attempt to minimize his conduct and demeanor at the hearing. Petitioner failed to maintain a calm and appropriate demeanor when he received important information from a governing authority that was contrary to his immediate desires. The Board expressly found that he displayed anger, failed to maintain his cool, and became "pissed off." The Board clearly rejected petitioner's attempt to claim he was just confused, and stated that he was just covering up; petitioner conceded the point. The Board's finding that petitioner displayed anger is supported by the record, and we defer to the Board's findings of credibility. (*Rosenkrantz, supra*, 29 Cal.4th at pp. 665, 677; *Juarez, supra*, 182 Cal.App.4th 1316, 1341.)

D. <u>Current dangerousness</u>

As we have explained, in order to uphold the Board's denial of parole, we must determine whether there is some evidence that petitioner posed a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor. (*Shaputis, supra*, 44 Cal.4th at p. 1254.) We find there is some evidence that

petitioner posed a current threat to public safety, based on the entirety of the Board's findings in this case.

"[T]he underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1211.) "On the other hand, 'the unexceptional nature of the commitment offense will not inevitably reflect a *lack* of current dangerousness without due consideration of the inmate's postconviction actions and progress toward rehabilitation.' [Citation.]" (*Lazor, supra,* 172 Cal.App.4th at p. 1201, italics in original.)

Given the entirety of the record, we find there is some evidence that petitioner's current demeanor and mental state established his current dangerousness to support the Board's denial of parole. While the Board characterized the commitment offense as "cruel," the Board's extensive findings were not solely based on the facts of the commitment offense, and were instead related to petitioner's current mental state, demeanor, and conduct as being probative of his current dangerousness, based on the Board's obvious concern that it needed to be "darn sure" of his suitability. (See, e.g., *Lawrence, supra,* 44 Cal.4th at p. 1214.)

Contrary to petitioner's arguments, the Board did not ignore petitioner's many years of counseling, sobriety, attendance and leadership at AA and NA meetings, recent positive disciplinary record, and other factors which tended to show his suitability for parole. Indeed, much of petitioner's hearing testimony appeared quite reflective of his personal problems, drug addiction, and efforts to improve his life. While the Board gave due consideration to those factors, it also properly considered petitioner's current mental state and demeanor, made individualized findings as to his current ability to function within the law if released from prison, and determined he was not suitable for parole. In doing so, the Board did not engage in a rote recitation of the regulatory factors for unsuitability, or base its findings on hunches, speculation, or intuition. There is clearly

"some evidence" to support the Board's denial of parole due to his failure to express remorse for the victim and his demeanor at the parole hearing. The entire focus of the Board's individualized findings addressed concerns about petitioner's potential risk to public safety if paroled. Although there was evidence in favor of petitioner's release, the Board's decision is supported by some evidence of current dangerousness, and we are bound by those findings.

DISPOSITION

The petition for writ of habeas corpus is denied.

_____
Poochigian, J.

WE CONCUR:

_____
Wiseman, Acting P.J.

_____
Kane, J.